



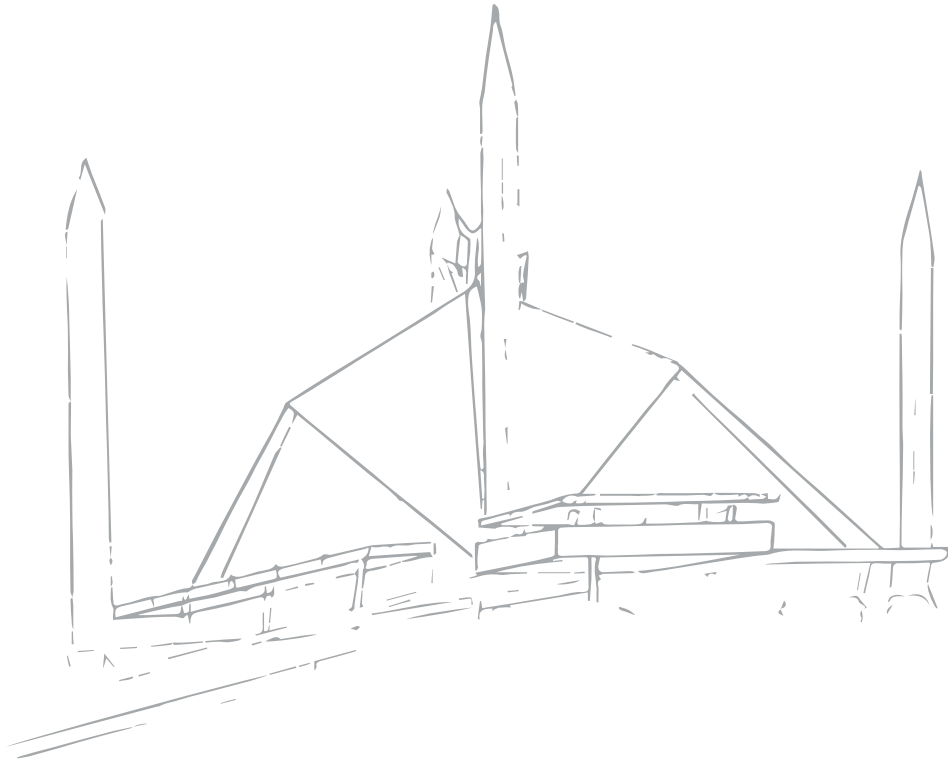
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# Legal Application of Restorative Justice: An Introduction in the Discipline of Legal Education

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## Abstract

*Restorative justice (RJ) is a type of transitional justice used as an alternative dispute resolution (ADR) tool that gives justice to all parties of a conflict without involving formal judiciary of the state. In Pakistan, there are alternative dispute resolution methods functioning; i.e. Jarga, Panchayat etc. but they are not formally recognized in legal system of the state. Employment of restorative justice by the judiciary will save time and resources of the judiciary as well as of the state. This will further reduce burden of the cases over the judiciary of the country. This restorative justice approach to conflict resolution is needed to be included in legal education of the country to understand its utilities and usage. This paper envisages that how restorative justice could be included in legal education? How the traditional conflict resolution approaches could be made attune with restorative justice that could be used in formal judicial system in the country? The research is limited to apply Pashtūnwalī , Pashtūn code of living, and further trying to theoretically and practically understand restorative justice and Pashtūnwalī .*

**Key words:** legal education, restorative justice, Pashtūnwalī, alternative dispute resolution.

## 1. Introduction

The management and dealing with the consequences of conflicts have an old history<sup>1</sup> and thus restorative justice (RJ) as old as the history of conflicts and subsisted in different forms and

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The Initial draft of this paper was [resented to a two-day international conference organized by Department of Law of International Islamic University Islamabad (IIUI) on “Legal Education in Pakistan” held on 27-28 March, 2019. In this work some interviewers were not willing to mention their names. Therefore they have been anonymized as ‘Respondent # 1, 2.

<sup>1</sup> P. Pantev, “Introduction: Conceptual and Terminology Issues of Post-Conflict Rehabilitation,” in Jean-Jacques de Dardel, Gustav Gustenau and Palmen Pantev, *Post Conflict Rehabilitation: Lessons from South East Europe and Strategic Consequences For the Euro-Atlantic Community* (Vienna: National Defence Academy and Bureau for Security Policy at the Austrian Ministry of Defence, 2006), 5-24.

processes in the course of law.<sup>2</sup> This paper focuses on its current implications in post-conflict scenarios as an example to understand the phenomenon and only focuses on victims and offenders to reintegrate them into society. This is a bottom-up approach in which the community is involved in the process of conflict management and resolution. In the process, victim, offender and the community are sit together to reach out an agreement for the offender to repair the harm caused by the offender, resultantly, encouraging their reintegration. The process provides opportunity for the victim and offender to express their views amenably, thus gives them respect and empowerment. This informal criminal justice process also benefits state judiciary by saving time and resources. Lastly, most importantly from the perspective of this work, it enables community, victims and offenders to have direct role in negotiation and reintegration processes. In restorative justice the offender is encouraged to accept his offense and compensate the victims through apology or any other means as in this process both the offender and victims are brought together for negotiations and settlements that provide maximum satisfaction to victims and offenders accountability.<sup>3</sup>

There are many successive stories of conflict management and resolution around the world through indigenous ways but they are not given its due value in formal judiciary system. Despite increasing westernization of the world and its formal and rational-legal approaches to conflict management indigenous traditions are not only relevant but most suited in many cases.<sup>4</sup> Professionals of peace and conflict have realized that peace endured and settlement lasts when parties involve in the process of conflict resolution and own it.<sup>5</sup> In restorative justice, the participants are from the community and, hence, they own it.

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<sup>2</sup> Sam Garkawe, "Restorative Justice from the Perspective of Crime Victims": Retrieved July 13, 2016, from Australian Legal Information Institute, see: <http://www.austlii.edu.au/au/journals/QUTLawJl/1999/4.pdf> , Last access at July 27, 2017.

<sup>3</sup> Ibid.,

<sup>4</sup> Akanmu G. Adebayo, J. J. Benjamin and B. Lundy, *Indigenous Conflict Management Strategies; Global Perspective*, (Maryland: Lexington Books, 2014).

<sup>5</sup> Ibid.,

This paper seeks answer to the questions that what are the relationships between indigenous institutions and formal legal institutions? How the indigenous ways could best be made to make them use for the future rehabilitation and reintegration process of victims and offenders? And, lastly, how this paper contributes to the fields of legal studies and peace and conflict studies? This paper, first, discusses theoretical understanding of restorative justice and then incorporates *Pashtūnwalī* which is a code of conduct of Pashtūn. *Pashtūnwalī* is a traditional code that is used to resolve all individual, communal as well as intra and inter-tribal conflicts. The paper is further reduced to discuss rehabilitation and reintegration of victims and offenders as an example for better explanation of the concepts of restorative justice and *Pashtūnwalī*.

## 2. Why Community Based Approach?

The community-based approach is likely to be successful in societies where the traditional norms and values are respected and followed. This approach is easily managed by the community members with less economic and resource expenditure. Rehabilitation and reintegration have been taken as examples to understand restorative justice and *Pashtūnwalī*. Rehabilitation and reintegration are also considered part of transitional justice in which the victims and offenders are provided justice to address their grievances. The practitioners and academicians of legal and peace and conflict studies are also favoring these traditional approaches for providing justice and punishment.<sup>6</sup>

This study is focusing on individual and community. The term 'community' in this work means the people living in a specific geographical location with similar norms, values, language and identity. This is a simple definition and will not go into deeper detail but to specify a frame of reference for this work. The community in itself is a conflicting concept among the practitioners and academicians of peace and conflict studies. The

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<sup>6</sup> W. Lambourne, "Transitional Justice and Peacebuilding after Mass Violence". *International Journal of Transitional Justice*, 3: 1 (2009): 28-48.

latter have variation of meanings for community.<sup>7</sup> Basia Spalek (2012) defined “Community as a concept that encompasses both individual and group identities and dynamics that are influencing and being influenced by these. Community might be taken as a space of belonging, consisting of one or more of a combination of geographical, imaginative, emotional, political and other ties”.<sup>8</sup> Thus, community is a space where individual and group identities are influenced, felt, expressed and contested.

Criminals are people from the society and without involving the community, the process of their rehabilitation and reintegration will not give fruitful results. The state institutions should first seek the policy of ‘winning hearts and minds’ of the community as this strategy is always adopted by the criminals too who need to strengthen their feet in community.<sup>9</sup> The state institutions have to break the bond between society and criminals as there are enough number of sympathizers and followers of criminals’ narratives within the society. Since, the criminals are part of the community and they will have to go back to their respective community so the community-based approach to rehabilitation and reintegration become essential.

The debates on failed reintegration revolve around the question of whether attention to reintegration should be given primarily to individual ex-criminals who pose threat to the security or to the society as a whole or to both simultaneously.<sup>10</sup> This debate concluded that both individual and community reintegration is imperative for peace-building and development in post-conflict societies.<sup>11</sup> Because in any conflict, both individual and community equally suffer and there is need to address grievances of both. An ongoing project of World Bank (WB) is focusing on reintegration of individual ex-combatants in Central African Republic and gives the argument that individual

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<sup>7</sup> B. Spalek, *Counter-Terrorism: Community-Based Approaches to Preventing Terror Crime*, (London: Palgrave Macmillan, 2012).

<sup>8</sup> *Ibid.*, p.29.

<sup>9</sup> *Ibid.*, p.32.

<sup>10</sup> Oluwatoyin Oluwaniyi, *The Challenges of Reintegration in Post-conflict Peacebuilding: the Case of Nigeria's Niger Delta Region*, (New York: Social Science Research Council (SSRC), 2018).

<sup>11</sup> *Ibid.*,

reintegration reduces threat to overall security of society.<sup>12</sup> However, the countries that prioritize individual ex-criminal over whole community come up with a failed reintegration because the community gets disappointed by the way the ex-criminals are privileged over community (views of majority respondents during field interviews in Swat). One, community is not taken into confidence which harbors misgiving towards acceptance of the ex-criminals back into the society and less attention is given to the overall society, social issue and revitalization of social capital.<sup>13</sup> Such societies who prioritize individuals over community in reintegration give forth gangs and criminal groups who get involved in crimes, kidnapping, drugs trafficking and illicit weapons as in Angola, DRC and Liberia.<sup>14</sup> Oluwaniyi (2018) confesses that the approach in which individual and community are reintegrated have been successfully applied in Niger Delta, where the ex-criminals passed through proper rehabilitation and then the process of reconciliation between the community and ex-combatants which is followed by a community development program for ex-criminals.

The “greatest resource for sustaining peace in-long run” is rooted in the culture of local people.<sup>15</sup> Barry Buzan (2003) added to the utility of conflict management through indigenous way as, in contemporary conflicts the state is referent object but scholars agreed that all the conflicts arise from within the society. Keeping the society in focus and as a referent object, the conflicts should be managed through indigenous ways.<sup>16</sup> Despite increasing westernization of the world and its formal and rational-legal approaches to conflict management, indigenous values are not only relevant but most suitable in many cases.<sup>17</sup> Resolving

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<sup>12</sup> World Bank, *Reintegration of Ex-combatants Project*, (Washington DC: unpublished, 2018).

<sup>13</sup> Oluwaniyi, *The Challenges*.

<sup>14</sup> Ibid.

<sup>15</sup> John Paul Lederach, *Sustainable Peace in Divided Societies* (Washington DC: USIP, 1997).

<sup>16</sup> Barry Buzan, and Ole Waever, *Regions and Powers: The Structure of International Security* (London: Cambridge University Press, 2003).

<sup>17</sup> Akanmu G. Adebayo, J. J. Benjamin and B. Lundy, *Indigenous Conflict Management Strategies*.

conflicts and other post-conflict issues through indigenous ways are encouraged by the United Nations (UN) as in most of the countries, the people have been dissatisfied and frustrated by the formal judiciary or justice system and, consequently, they appeal for the customary or traditional practices of justice to deal with the crime and disorder in society. Restorative justice offers some welcoming means of resolving disputes and other post conflict issues.<sup>18</sup>

### 3. The Theory of Restorative Justice

The management and dealing with the consequences of conflict is having a long history<sup>19</sup> and thus restorative justice is as old as the history of conflicts and subsisted in different forms and processes in the course of law.<sup>20</sup> Restorative justice subsisted throughout history. It is a complex term and cannot be defined precisely with a singular definition. Although, scholars and professionals have tried to give a definition which could nearly explain the term. A simplified definition of restorative justice drawn by the United Nations is, “any program that uses restorative processes and seeks to achieve restorative outcomes”.<sup>21</sup> But this is still ambiguous and does not clarify the implication of the term properly. Tony Marshall (1999) defined restorative justice as it, “is a process whereby all the parties with a stake in a particular offense come together to resolve how to deal with the aftermath of the offense and its implications for the future”.<sup>22</sup> John Braithwaite (2003) had given very short but a comprehensive definition of the term as “restoring the balance between victims, offenders and the community”.<sup>23</sup> These definitions clarify the actual meaning and purpose of restorative justice which reveals

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<sup>18</sup> United Nations, “Integrated DDR Standards”, (Washington: 2006).

<sup>19</sup> Pante, *Introduction.*, 2006.

<sup>20</sup> Sam Garkawe, “Restorative Justice from the Perspective of Crime Victims”, 1999, Retrieved July 13, 2016, from Australian Legal Information Institute: <http://www.austlii.edu.au/au/journals/QUTLawJl/1999/4.pdf>. Last access at: , July 27, 2017.

<sup>21</sup> United Nations, *Integrated DDR Standards*, 2006.

<sup>22</sup> Tony F. Marshall, *Restorative Justice: An Overview*, Research Development and Statistics Directorate, Home Office, (London: Crown Publishers, 1999).

<sup>23</sup> Braithwaite, J., “Restorative Justice: Theories and Worries”, Australia: The United Nations Asia and Far East Institute (UNAFI) for the Prevention of Crime and the Treatment of Offenders (UNAFEI), 2003.

that there must be two parties; victim and offender in the negotiation process in the presence of the members of the community to find a way to heal grievances of both victim and offender. The community members are playing here a vital role which will be discussed in later on.

### 3.1. History of Restorative Justice

The present rehabilitation centers around the world are actually the reformatory centers, initiated in 19<sup>th</sup> century, in which the state called the reformatory to rehabilitate the offenders in a semi-military regime.<sup>24</sup> The reformatories introduced educational and vocational trainings and the prisoners could be released earlier on their conduct. The reformatories also introduced classification of the prisoners.<sup>25</sup> In Swat Valley, a district of Pakistan, this reformatory strategy is intake in rehabilitation centers. The centers are providing educational and vocational trainings as well as the prisoners have been divided into hard-core and soft-core; that is, classification. But, Campbell (2005) adds that later on, the reformatories advocated punishment for prisoners and ultimately, retribution re-emerged.

The second concept, restorative Justice, evolved in 1970s to correct some weaknesses in criminal law in formal legal system, based on retributive justice for the rehabilitation of criminals to reintegrate them into the society. Currently, there are numerous rehabilitation programs running around the world but restorative justice is wider in its scope than criminal law.<sup>26</sup> The advocates of RJ are of the view that formal-legal system is mainly concerned with the offender and neglects the victim.<sup>27</sup> On the contrary, restorative justice engages all parties in the processes; i.e. victim,

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<sup>24</sup> Campbell, K. M., *Rehabilitation Theory*, (M. Bosworth, *Encyclopedia of Prisons and Correctional Facilities*), (Thousand Oaks: Sage Publications, 2005), pp. 831-834.

<sup>25</sup> Ibid.,

<sup>26</sup> Howard Zehr, , "Restorative Justice; What's That?", (October 22, 2009), Retrieved July 13, 2016, from International Institute for Restorative Practices: [http://www.iirp.edu/article\\_detail.php?article\\_id=NjMx](http://www.iirp.edu/article_detail.php?article_id=NjMx). Last access at , July 28, 2017

<sup>27</sup> O'Hara, E. A. & Robbins, M. M., "Using criminal punishment to serve both victim and social needs", *Law and Contemporary Problems*, 72 (02), 2009, pp.199-217.



offender and community. Evidences suggest that restorative justice empowers the victims, offenders of an offense in the presence of communities to engage in the processes and to formulate public response to the offense. This process strengthens public trust over justice system and may reduce even re-offense rate.<sup>28</sup> Usually, the restorative justice processes are conducted as conferences.

“Disrespect begets disrespect”, says Howard Zehr (1995).<sup>29</sup> Restorative conferences provide respect not only to the victims but to the offenders too. In these conferences the nuclear family of the offender is also present so that an offender may not feel himself unaided. In isolation he might feel shame over his actions and may not wish to rejoin his community. The restorative conferences give maximum opportunity to an offender to express his views and explanations of the crime he has done. This process gives respect to offender; ultimately, empowering him by not excluding him in the negotiation process. He has not been ignored on the basis of wealth, race or sex. This empowerment to the criminal as well as to the victim makes them responsible persons and they will try to resolve the issue in a constructive manner.<sup>30</sup> This is also an indicator for success of RJ that the process is owned by the parties.

There are several examples around the world where criminal law is replaced with restorative justice. Majority of the countries are trying to make restorative justice processes a formal procedure dealing with criminals. Formally, first New Zealand set up the state-run victim compensation fund in 1963, then the United States initiated her first compensation program in California in 1965.<sup>31</sup> The program was further extended to most of the

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<sup>28</sup> Zvi D. Gabbay, “Justifying Restorative Justice: A Theoretical Justification for the Use of Restorative Justice Practices”, (2005), Retrieved July 18, 2016, from International Institute of Restorative Practices:

<http://www.iirp.edu/pdf/justifyingrj.pdf> last access at: , July 28, 2017

<sup>29</sup> Zehr, H., “Restorative Justice, October 22, 2009.

<sup>30</sup> Maivel Rodríguez López, Eleni Andreouli, Caroline Howarth, “From ex-combatants to citizens: connecting everyday citizenship and social reintegration in Colombia”, *Journal of Social and Political Psychology*, 3 (2), 2015.

<sup>31</sup> Bright, C., “Victims Compensation Fund”, Retrieved June 20, 2018, from Center for Justice and Reconciliation, (2018).

<http://restorativejustice.org/restorative-justice/about-restorative->

European countries including, the Netherland, Austria, Denmark, Sweden, Germany, Ireland, France, the United Kingdom and Norway.<sup>32</sup> In Australia, the Canberra and the North NSW Youth Conferences are found more successful where the victims and offenders found more time to express and share their views than in prisons (López, et.al, 2015 and Garkawe, 1999).<sup>33</sup>

In Africa and Asia, the Sierra Leonean Truth and Reconciliation Commission (TRC) (in 2003), the Peruvian TRC (in 2003), and the Commission for Reception, Truth and Reconciliation in East Timor (in 2005) were authorized to find the root causes and legacies of the conflicts and their works were specified to peace building and post conflict rehabilitation.<sup>34</sup> Currently, most of the countries have shifted their attention to a more participatory approach to rehabilitation and reintegration by admitting the deficiencies of paternalistic<sup>35</sup> reintegration programs which include the Democratic Republic of Congo, the Philippines, and Colombia.<sup>36</sup> These participatory approaches guarantee the engagement of ex-combatants or ex-criminals, receptive communities' members, local and national stakeholders; such as, elders and religious figures.<sup>37</sup>

### 3.2. Restorative Processes

Restorative process is defined by United Nations (2006, p-9) as, "any process in which the victim and the offender, and where appropriate, any other individuals or community members affected by a crime, participate together actively in the resolution of matters arising from the crime, generally with the help of a

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justice/tutorial-intro-to-restorative-justice/lesson-3-programs/victim-compensation-fund/. Last access at: , July 23, 2017

<sup>32</sup> Ibid.,

<sup>33</sup> Rodríguez López, Maivel, Andreouli, Eleni and Howarth, Caroline, *From ex-combatants*, 2015 and Sam Garkawe, "Restorative Justice from the, 2015.

<sup>34</sup> Rebekka Friedman, *Transitional Justice and Conflict Transformation in Post-War Societies: Practical and Ethical Implications*, (London: King's College London, 2013).

<sup>35</sup> The system, principle, or practice of managing or governing individuals in the manner of a father dealing benevolently and often intrusively with his children.

<sup>36</sup> López, Rodríguez, Maivel, Andreouli, Eleni and Howarth, Caroline, *From ex-combatants*, 2015.

<sup>37</sup> Buxton, J., *Reintegration and Long-term development: Linkages and Challenges*, (Bradford: University of Bradford, 2008).

facilitator".<sup>38</sup> The other community members mean nuclear relatives of the victims and offenders, friends and elders. Braithwaite (2003) has given a comprehensive definition to the restorative process as;

Restorative justice conferences work by inviting victims and supporters (usually family supporters) of the victim to meet with the offender and the people who care most about the offender and most enjoy the offender's respect (usually including both the nuclear and extended family, but not limited to them). Within this negotiation, the consequences of the crime, drawing out the feelings of those who have been harmed. Then they discuss how that harm might be repaired and any step that should be taken to prevent reoffending.<sup>39</sup>

Restorative justice is seen theoretical when it comes to its practical application. Most of the stakeholders are of the view that if an offender could not be compensated then restorative justice for rehabilitation and reintegration will not be successful.<sup>40</sup> Implementation of restorative justice might be difficult in the countries where indigenous society or traditional laws are hardly followed. But, in *Pashtūn* society people still follow their traditional laws: norms and values and, therefore, restorative justice could be utilized as it involves the community. Involvement of the community in post-conflict rehabilitation and reintegration is like the vertebral column that sustains social, economic and political aspects of the society.<sup>41</sup> Nearly, all Pashtūn follow *Pashtūnwalī* and, therefore, this is not surprising by bringing *Pashtūnwalī* and RJ together and to make them according to modern legal system. Most of the principles of restorative justice are found similar to that of *Pashtūnwalī*. Howard Zehr (2009), Professor of Restorative Justice, pointed out three main principles of restorative justice; restoration, accountability and engagement; i) repair the damage caused by the offender (restoration); ii) encourages proper responsibility for addressing

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<sup>38</sup> United Nations, *Integrated DDR Standards*, 2006, p.6.

<sup>39</sup> Braithwaite, *Restorative Justice: Theories*, 2003.

<sup>40</sup> Anwer Anjum, in-person interview, Mingora, July 25, 2017

<sup>41</sup> López, Rodríguez, Maivel, Andreouli, Eleni and Howarth, Caroline, *From ex-combatants*, 2015.

needs and repairing the harm (accountability); iii) involvement of the victims including the community in restorative process (engagement).<sup>42</sup>

### **3.3. Reparation and Compensation in Restorative Justice in the Context of *Pashtūn* society**

The consent of both parties is necessary to bring them to negotiations or conferences.<sup>43</sup> The agreement when concludes may “include reparation, restitution and community services, the purpose of community services, to fulfill the individual and collective needs and responsibilities of the parties, achieving reintegration of the victims and offenders”.<sup>44</sup>

*Reparation as apology.* – Apology is one the basic tenets of restorative justice. Before entering to negotiations, both the parties have already consented that victim will give pardon and offender believes that he will be apologized.

*Monetary Restitution.* – Monetary restitution has remained the popular culture of restorative justice. The offender will pay money for the harm he has inflicted, either in cash or any other form, as decided in negotiations, to the victim.

*Reparation as Community Services.* – During the negotiations if it is decided that offender will do community services or will provide services to the victim then this penalty is awarded to the offender in case the offender is unable to retribute the victim.

*Compensation by the State.* – Compensation by the state to the victims and offenders has been adopted by most of the

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<sup>42</sup> Zehr, *Restorative Justice*, October 22, 2009.

<sup>43</sup> Zvi D. Gabbay, “Justifying Restorative Justice: A Theoretical Justification for the Use of Restorative Justice Practices”, (2005), Retrieved July 18, 2016, from International Institute of Restorative Practices: <http://www.iirp.edu/pdf/justifyingrj.pdf> Last access at: July 23, 2017.

<sup>44</sup> Nations, United, *Handbook on Restorative Justice Program*, (New York: United Nations, 2006).

countries around the world.<sup>45</sup> They have established different institutions and arranging conferences for restorative justice. It is responsibility of modern nation states that it should care about its citizens. The state is for the individual, as liberals say, and should do whatever citizens feel feasible. The purpose of rehabilitation in prisons is to assist the ex-criminals in rehabilitation. Similarly, the state should assist the offender to compensate the victims for the harm done by the offender.

Pakistan is already assisting the victims for their losses in the conflict. State is receiving assistance from international community and donors and it further distributes that assistance among the victims in the form of aid. Now, if the state wants to strengthen restorative justice' then the state should encourage it and compensate the victims as decided during 'restorative-Jarga'<sup>46</sup>. There should be formulation of policy and allocation of special 'compensation fund' through which the government compensate the victims and offenders of conflicts. The policy should clearly mention the eligibility on the basis of the nature of the conflict.<sup>47</sup> The communal conflict should not be included in this compensation fund. Through this fund, the government will compensate the economic, social and political losses of the victims as well as of offenders.

#### **4. Pashtūnwalī and Restorative Justice**

*Pashtūnwalī* is the *Pashtūn* way of life. It is an umbrella term, covering all codes and values of *Pashtūn* culture in it. The most relevant codes of *Pashtūnwalī* with restorative justice are; *Jarga*, *Nanawāti*, *Khushāmanda*, and *Lashkar or Salweshṭi*.

*Jarga*; as defined by Gohar (2014) "is community-based fact-finding and it acts like a modern jury. It intervenes to halt violence, identify the issues, and resolve them through mediation

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<sup>45</sup> Bright, C., *Victims Compensation Fund*, Garkawe, S., Restorative Justice and Friedman, R., *Transitional Justice and Conflict*.

<sup>46</sup> The term used in this paper when restorative justice process is adopted in traditional *Jarga* system.

<sup>47</sup> Fazal Saeed, in-person interview, Islamabad, June 23, 2017.

or arbitration and further works for reconciliation and rehabilitation".<sup>48</sup> There are different types of *Jarga* but the working principles are same. *Jarga* is usually called at the consent of both parties and parties are present in the processes. *Jarga* listens to the claims of both parties and then in the light of *Pashtūn* codes, they decide accordingly. Same in the process of restorative justice in which the parties and the community sit together to resolve the conflict and rehabilitate the victim and offender. Usually, the *Jarga* members are from the same area (from vicinity of victim and offender) but may be called from other areas and tribes too. The only difference in restorative conference and *Jarga* is that in the former, the parties to the conflict come to an agreement while there is, simultaneously, arbitration and mediation in *Jarga*.

#### 4.1. Formation of Restorative- *Jarga*:

Traditional *Jarga* is formed by the elders of the village or tribe. Constituting a *Jarga* in restorative justice should follow the procedure as; *Jarga* must include members of the community (village); one member from the nuclear family of ex-combatant, *Mullah/Imam* of the mosque of that village, Nazim of the area or village councilor, a police officer of the respective police station, members of the nuclear families of victim as well as of offender, and other two or three elders of the community.<sup>49</sup> This body should be named with either modern name 'committee' or with traditional name '*Jarga*' or with the name, as described by John P. Lederach (1997), 'peace constituency'.<sup>50</sup> But, if it is called '*Restorative-Jarga*' this will represent the actual meaning of this body.

This committee (*Restorative-Jarga*) will investigate the ex-combatant that how much that person was involved in offense/crime, what losses he has done to a family, community or state. This *Jarga* will decide that in which category (white, black and grey) the ex-combatant should fall and how to compensate or

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<sup>48</sup> Hassan M. Yousudzai & Ali Gohar, *Jirga: An Indigenous Institution for Peacebuilding in the Pukhtoon Belt of Pakistan and Afghanistan*, ( J. J. Akanmu G. Adebayo, *Indigenous Conflict Management Strategies*), p. 183-193.

<sup>49</sup>Fayaz Zafar, in-person interview, Mingora, July 25, 2017.

<sup>50</sup> Lederach, *Sustainable Peace*.

punish this ex-combatant. This restorative-*Jarga* better knows the grievances of ex-combatant as well as the crime he had done as these are the members of his community.<sup>51</sup>

The logic behind recruiting the above members of the community in Restorative-*Jarga* is that the family member of ex-combatant are necessarily to be taken on board so that he is not discriminated and his grievances are listened to and fully addressed by the community. Imam of the village draws enormous respect and his sayings are valued in *Pashtūn* society and he is well aware of the community. Therefore, his presence is mandatory. His presence is also necessary if “restorative-*Jarga*” needs religious guidance and reference in some cases. The presence of a police officer is required just to execute the decision taken by the *Jarga* as well as a witness that the ex-combatant is rehabilitated. The other members are necessary to satisfy the community that the offender is punished by the community.

The procedure in a *Jarga* is as follows:

When *Jarga* sits, its jurisdictions can be *Nanawāti* or *Khushāmanda* (only in case of rehabilitation and reintegration) the detail is bellow;

*Nanawāti*: ‘pleading for pardon’ in English. The *Jarga* when decide that the offender will seek pardon of his crime he has done. The offender is bound to follow *Jarga* jurisdiction and will plead for an apology. Now it depends on victim to accept his apology or not, but usually it is accepted as a tradition and the offender when seeks apology the elders of the community accompany him. The procedure of *Nanawāti* is; the offender goes to the victim’s home for seeking apology; or, offender enters the grave when any relative of the victim has died and offender stays there till he is forgiven; or in extreme cases, the offender sends women to the victim home for seeking apology; or as may decide the *Jarga*.<sup>52</sup> Its jurisdiction may be in the form of money or land. When victim agrees for pardon then the whole community is called for a public eating and the expenses are to be borne by the offender. Through

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<sup>51</sup> Anwer Anjum, in-person interview, Mingora, July 25, 2017.

<sup>52</sup> Mehran Wazir, in-person interview, Islamabad, July 25, 2016.

this way the victim and offender are reconciliated and are reintegrated through indigenous customs.

The tradition of *Nanawāti* can be utilized in restorative justice and could be made as a formal procedure for rehabilitation and reintegration. As the apology is also one of the principles of restorative justice. Story from South Waziristan;

*The youngsters had beaten a member of Taliban. Taliban came and took many youngsters of the tribe in their custody for nearly three days and maltreated them. The tribe agitated and wanted to take Badal (revenge) from Taliban. Other tribes of the area realized the situation that the conflict might escalate to a more violent scale. They intervened and formed a Jarga of 120 members. The jurisdiction of Jarga was that that Taliban will follow the code of Nanawāti (will seek apology of their act) and will compensate 12 buffalos to the victims. In that way, the conflict was resolved and the victims were rehabilitated.<sup>53</sup>*

*Khushāmanda*: 'the expelled-one' in English. *Jarga* in its jurisdiction may decide *Khushāmanda*, instead of *Nanawāti*, that the offender will leave the community, the area of his residence and will not return home for a specific period or for life. Through this way the rest of the family remains in honor and safe. In the existing demobilization and then rehabilitation strategy in Swat, when an offender is out access and control of security forces, his family members are arrested for the purpose that family will help out in arresting of the criminal. By making that criminal/offender *Khushāmanda*, the rest of the family will remain safe and peaceful.

### **A story from Bajaur, a district of Pakistan;**

*Nisar Khan is a Khushāmanda living in Islamabad since 2012. There was 70 years old enmity between two tribes in Bajaur. A number of people were killed from both sides. In 2012, Jarga resolved the enmity and to make one person of the tribe Khushāmanda for the tribe's offense against the other tribe. Nisar Khan of the offender tribe was made Khushāmanda to satisfy the victim tribe as its member was killed. Now,*

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<sup>53</sup> Mehran Wazir, in-person interview, Islamabad, July 25, 2016.



*Nisar Khan is living in Islamabad and the tribes are living in peace there in Bajaur.*<sup>54</sup>

Through this way, the ex-combatant should be brought forth in front of the community during restorative justice process. The 'restorative Jarga' will decide the nature of crime as well as the punishment. The ex-combatant will be made *Khushāmanda* and will be expelled from the area. The rest of his family and the community will live in peace.

In *Pashtūn* society, as revealed during the field survey, there is fear of communal conflicts as the *Pashtūn* do not forget their enemy and always seek *Badal* (revenge). The community is now silent due to the presence of security forces in the area but as soon as the security forces vacate the area, the community will seek revenge from those rehabilitated ex-combatants who have done wrong to the community during war on terror.

*Lashkar*: *Lashkar* 'or tribal militia in English' is a standing body that consists of the volunteers from the community that execute the jurisdiction of the *Jarga*. Such force defends the community against foreign aggressors or curbs the intra-tribe malefactors. The strength of *Lashkar* is different in some *Pashtūn* areas; those are commonly three types. Sometime numerable tribesmen from different tribes participate against any aggression or intra-tribe offense. Another type is called *Salweshtī* 'or the forty' but in the North a third type which is called *Shalgon*; that is a body of twenty men. Thus, it is very difficult for an offender(s) to violate the *Jarga's* decision. *Jarga* represent the whole community, and if its verdict is violated, it means the offender or (in case if it is a tribe) becomes the enemy of the whole community.

In restorative justice this standing force could be replaced by the police of the locality. As this research suggested earlier that 'restorative *Jarga*' should include a police officer. The police officer will execute the jurisdiction during restorative-*Jarga* process.

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<sup>54</sup> Nisar Khan, in-person meeting, Islamabad, March 08, 2017.

## 4.2. Discussion

Every community is deeply suffers with the violent conflict. Sometimes the case of post-conflict rehabilitation, reintegration and reconciliation become very difficult, especially in stimulating the people to start dealing with their own problems.<sup>55</sup> The restorative justice approach to rehabilitation, reintegration and reconciliation for ex-criminals and victims is considered most feasible and suitable for bringing them back into society. This is because; the most appealing principle of restorative justice is the engagement of community or civilians in restorative process as the criminals are the members of the community and this participatory approach is giving respect to them.<sup>56</sup>

The result of the rehabilitation or reintegration programs will not be productive when community is not involved in the process. Or, if the community is involved but when they collectively rejects the grievances and appeals of the criminal and state forcefully bring that criminal into society. Another good aspect of restorative justice (restorative *Jarga*) is that it is doing state's job that eases the burden on state institutions by addressing grievances of both victim and offender. Moreover, restorative *Jarga* provides speedy justice with minimum expenses which further reduces burden on state's treasury. On contrary, a critique is related to security that tells that community will not provide security to the ex-criminals/ex-combatants who have surrendered as well as to the community members; especially, who involve in restorative-*Jarga*.<sup>57</sup> They coined that state involvement is imperative for formation of restorative *Jarga* and implementation of its decisions. State will provide security as well as financial assistance to this local body. But this critique can be counted on the basis that *Pashtūn* society has an established concept of *lashkar* or civil militia that could be utilized in restorative *Jarga* processes for providing security and for implementation of restorative *Jarga* decisions.

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<sup>55</sup> Pante, "Introduction: Conceptual", 2006.

<sup>56</sup>Dr. Arshad Ali, in-person interview, Khwazakhela, July 23, 2017.

<sup>57</sup> Respondent # 15, in-person interview, Peshawar, April 02, 2017.

## 5. Conclusion

“Resilience at national level is influenced by what is happening at the global and community level of society”.<sup>58</sup> All conflicts have roots in society and should be managed through indigenous ways of conflict management. The management of conflict should followed by rehabilitation and then reintegration of the offenders and victims into society through this indigenous way. Academicians and practitioners of peace and conflict studies have worked tremendously on conflict resolution and its management at society level but very little attention has been paid to rehabilitation and reintegration in this regard. Restorative justice could be one of the best and easy ways of rehabilitation and reintegration at societal level. The research institutions and other stakeholders of peace and conflict studies need to do work on indigenous solutions of post conflict development. Every society has its distinct features; norms, values and traditions and they have ways of conflict management and rehabilitation in it. The scholars need to find those traditions for every society separately. This will ease the burden of conflict management on state as the formal judiciary and police system consumes a lot of state resources in resolving the conflict and post conflict situations.

The experts are in favor of community-based approach to rehabilitation; however, the researcher received diverse opinions regarding this approach. Some argued that the ex-combatant are permanent threat to society and are very powerful who, the community feels, could not be controlled by the community. To control them, these ex-combatants need some powerful authority who could keep a check on them. The authority could be military only. This perception is developed when these ex-combatants targeted the powerful and influential individuals in society. At that time, they had this power to target anyone. However, when they surrendered or captured then their might is broken.

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<sup>58</sup> Brandon D. Lundy, “Monitoring Conflicts of Interest: Social Conflict in Guinea-Bissau's Fisheries”, (J. J. Akanmu G. Adebayo, *Indigenous Conflict Management Strategies*, p. 151-165.

The community-based approach discussed in this chapter is accommodating traditional institution in the modern one. This may face challenges but need further research and practice to make this approach practical. The first challenge it could face is from security agencies. It challenges the power of the security agencies and reduces their power of jurisdiction and interference in public affairs. Second, this also needs further investigation that either restorative *Jarga* should be elected or selected or what should be the procedure. Third, this requires a wholeheartedly support of governmental and other peace dividend for restorative *Jarga*.

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